Supreme Court, U.S.
FILED
APR 7 1997
CLERK

(4)

No. 96-738

In The

Supreme Court of the United States

October Term, 1996

MARIO SALINAS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

BRIEF FOR PETITIONER

FRANCISCO J. ENRIQUEZ*
ROLANDO CANTU
ENRIQUEZ & CANTU, L.L.P.
4200-B N. Bicentennial
McAllen, Texas 78504
(210) 686-5291

Attorney for Petitioner
**Counsel of Record*

CYCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

I. The case against Salinas does not meet the prerequisites for a federal prosecution under 18 USC §666 the Federal Bribery Statute because no Federal funds were in any manner impinged upon. The case involved bribery from a prisoner in return for contact visits. It had nothing whatsoever to do with the disbursement of or impingement upon Federal, or even state or local, funds. The question presented here is:

What kind of cases involving state employees are subject to prosecution under the Federal Bribery Statute 18 USC §666? Do such cases include cases where no federal funds are disbursed or impinged?

II. Counts 1 and 2 of the indictment cover RICO substantive and RICO conspiracy respectively. The RICO substantive statute requires that the government prove two predicate acts before a defendant can be found guilty. Salinas was found not guilty of Count 1 (RICO substantive). Salinas contends that before he could be found guilty of RICO conspiracy the government must have proven that Salinas personally committed or agreed to commit two RICO predicate acts. The trial court did not charge the jury in this manner and, in fact, required no acts on Salinas' part. The question presented here is:

Before a defendant can be found guilty of the Conspiracy provisions of the RICO statute, must the government prove that he personally committed or agreed to commit two RICO predicate acts?

LIST OF PARTIES

Petitioner:

MARIO SALINAS
Francisco J. Enriquez
Rolando Cantu
Enriquez & Cantu, L.L.P.
4200-B N. Bicentennial
McAllen, Texas 78504

Respondent:

UNITED STATES OF AMERICA
C/O SOLICITOR GENERAL
Department of Justice
Washington, D.C. 20530

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
REFERENCE TO THE OPINIONS OF THE COURTS BELOW	1
STATEMENT OF JURISDICTION	1
STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
SUMMARY OF THE ARGUMENT	4
ARGUMENT AND AUTHORITIES:	
I. The Fifth Circuit's Opinion Directly Conflicts With The Second Circuit Decision In *Foley* And The Third Circuit Decision In *Cicco* Which Indicate That The Type Of Actions Prosecuted In Salinas Do Not Fall Under The Federal Bribery Statute	5
II. The Fifth Circuit's Opinion On The Issue Of RICO Conspiracy Elements Is Directly In Conflict With The First Circuit Decision In *Carrozza*, The Second Circuit Decision In *Ruggiero* and The Tenth Circuit Decision In *Sanders*	24
CONCLUSION	42

TABLE OF AUTHORITIES

Page

CASES

Brecht v. Abrahamson, 507 U.S. 619, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993) 12

City of El Paso v. El Paso Community College, 729 S.W.2d 296 (Tex. 1986) 22

Commissioners Court of Shelby County v. Ross, 809 S.W.2d 754 (Tex. App. – Tyler 1991, no writ) 22

Ex parte Harrell, 542 S.W.2d 169 (Tex. Ct. Crim. App. 1976) 38

Ex parte Holbrook, 606 S.W.2d 925 (Tex. Ct. Crim. App. 1980) (En banc) 38

Gregory v. Ashcroft, 501 U.S. 452, 111 S.Ct. 2395, 115 L.Ed.2d 410 (1991) 11, 13, 14, 36, 40

H.J. Inc. v. Northwestern Bell Telephone Company, 492 U.S. 229, 109 S.Ct. 2893, 106 L.Ed.2d 195 (1989) 27, 32, 33

Hild v. State, 94 S.W.2d 733 (Tex. Crim. App. 1936) 39

Irby v. Sullivan, 737 F.2d 1418 (5th Cir. 1984) 21

Logue v. United States, 412 U.S. 521 (1973) 16, 17

McNally v. United States, 483 U.S. 350, 107 S.Ct. 2875, 97 L.Ed.2d 292 (1987) 11, 13, 35, 36

Pennhurst State School & Hospital v. Halderman, 465 U.S. 89 (1984) 40

Reves v. Ernst & Young, 507 U.S. 170, 113 S.Ct. 1163, 122 L.Ed.2d 525 (1993) 26, 34

Sedima, S.P.R.I. v. Imrex Company, Inc., 473 U.S. 479, 105 S.Ct. 3275, 87 L.Ed.2d 346 (1985) 12, 26, 27, 34

TABLE OF AUTHORITIES – Continued

Page

State v. Garcia, 800 S.W.2d 872 (Tex. App. – San Antonio 1990, petition for discretionary review refused) 22

Stromberg v. California, 283 U.S. 359, 51 S.Ct. 532, 75 L.Ed. 1117 (1931) 24, 41

Tafflin v. Levitt, 493 U.S. 455, 100 S.Ct. 792, 107 L.Ed.2d 887 (1990) 13, 36

Tawfik v. State, 643 S.W.2d 127 (Tex. Ct. Crim. App. 1982) (En banc) 37

United States v. Barquin, 799 F.2d 619 (9th Cir. 1986) 23

United States v. Carter, 721 F.2d 1514 (11th Cir. 1984) 31

United States v. Cicco, 938 F.2d 441 (3rd Cir. 1991) 6

United States v. Coia, 719 F.2d 1120 (11th Cir. 1983) 33

United States v. Crozier, 987 F.2d 893 (2nd Cir. 1993) 7

United States v. Delano, 825 F.Supp. 534 (W.D.N.Y. 1993) 33

United States v. Elliot, 571 F.2d 880 (5th Cir. 1978) 25

United States v. Foley, 73 F.3d 484 (2nd Cir. 1996) 8

United States v. Frega, 933 F.Supp. 1536 (S.D.California 1996) 20

United States v. Hartec Enterprises, Inc., 967 F.2d 130 (5th Cir. 1992) 24, 41

United States v. Lopez, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995) 14, 40

TABLE OF AUTHORITIES – Continued

Page

United States v. Marcello, 876 F.2d 1147 (5th Cir. 1989) 25

United States v. Marmolejo, 89 F.3d 1185 (5th Cir. 1996) 38

United States v. Moeller, 987 F.2d 1134 (5th Cir. 1993) 7, 21

United States v. Phillips, 664 F.2d 971 (5th Cir. 1981), *cert. denied*, 457 U.S. 1136, 102 S.Ct. 2965 (1982) 25

United States v. Simas, 937 F.2d 459 (9th Cir. 1991) 9

United States v. Stewart, 727 F.Supp. 1068 (N.D. Tex. 1989) 19

United States v. Turkette, 452 U.S. 576, 101 S.Ct. 2524, 69 L.Ed.2d 246 (1981) 26

United States v. Westmoreland, 841 F.2d 572 (5th Cir. 1988) 7

United States v. Winter, 663 F.2d 1120, (1st Cir. 1981), *cert. denied*, 460 U.S. 1011, 103 S.Ct. 1249, 75 L.Ed.2d 479 (1983) 28

United States v. Wyncoop, 11 F.3d 119 (9th Cir. 1993) 8

STATUTORY PROVISIONS

18 USC §201 9

18 USC §641 9

18 USC §665 9

18 USC §666 ..... *passim*

18 USC §1341 ..... 11, 35

TABLE OF AUTHORITIES – Continued

Page

18 USC §1961 ..... 1, 2, 4, 35, 37, 38

18 USC §1962 ..... 1, 14, 28, 34

18 USC §3575 28

18 USC §4002 ..... 1, 16

28 USC §1254 1

31 USC §3902 18

31 USC §3903 18

31 USC §6101 19

Texas Local Government Code Section 85.003 21

Texas Penal Code Section 12.21 38

Texas Penal Code Section 36.01 38

Texas Penal Code Section 36.02 ..... 37, 38, 39

Texas Penal Code Section 36.08 37

CONSTITUTIONAL PROVISIONS

U.S. Const., Art. I, §8, cl. 3 3

Tex. Const., Art. V, sec. 23 21

SECONDARY AUTHORITIES

Practice Commentary following Section 36.08 of the Texas Penal Code 37

MISCELLANEOUS

1984 USCCAN 3510 9

1984 USCCAN 3511 ..... 10, 19

REFERENCE TO THE OPINIONS OF THE COURTS BELOW

The Court of Appeals Opinion can be found at 89 F.3d 1185 (5th Cir. 1996) and is reproduced in the Appendix to the Petition for Writ of Certiorari.

STATEMENT OF JURISDICTION

The Fifth Circuit rendered its opinion on July 17, 1996. Petitioner filed a Motion for Rehearing and Suggestion for Rehearing en Banc. The Rehearing was denied on August 15, 1996. Petitioner timely filed his petition for writ of certiorari on November 12, 1996. The petition was granted on February 24, 1997. This Court has jurisdiction pursuant to 28 USC §1254 (1).

STATUTORY PROVISIONS INVOLVED

18 USC §666

18 USC §1961

18 USC §1962

18 USC §4002

They are reproduced in the Appendix to Petition for Writ of Certiorari.

STATEMENT OF THE CASE

(A) Course of proceeding and disposition in the trial court.

On January 18, 1994, the Petitioner Mario Salinas (hereinafter "defendant" or "Salinas"), was indicted in an eight count indictment only four of which applied to him, charging that he had engaged in a pattern of racketeering activity by accepting bribes in return for contact visits. On July 18, 1994, Salinas was tried by a jury before the Honorable George P. Kazen in the Southern District of Texas, Laredo Division. The jury found Salinas guilty of Counts Two, Three and Four, and not guilty of Count One. Count Two is RICO Conspiracy, 18 USC §1961 et seq. Counts Three and Four are based on 18 USC §666 (Federal Bribery). Judgment was entered November 30, 1994 and a timely Notice of Appeal was filed. Bond pending appeal was granted.

(B) Statement of Facts

On or about June 1991 Homero Beltran, a Federal prisoner, was placed in the Hidalgo County Jail, Hidalgo County, Texas, by the U.S. Marshall's office. He remained there until approximately March or April of 1992 at which time he was moved to other institutions eventually being placed in a Federal penitentiary. During this first stay he pled guilty in January 1992 to a number of Federal drug violations. On or about November of 1992 Beltran was returned again at the Marshall's direction to the Hidalgo County Jail. He was kept there pending a case concerning an associate of his against whom he was

suppose to have testified. His stay this time ended in April 1993.

He has claimed that during this time he and his brother-in-law Juan Antonio Guardado paid numerous bribes to Brigido Marmolejo, Sheriff of Hidalgo County in return for the Sheriff arranging and allowing contact and conjugal visits. According to Beltran most of these visits took place in the Sheriff's personal office.

Mario Salinas at all times important to this prosecution was a deputy sheriff and held the title of a Chief Deputy. He was assigned the duties of managing the jail in Hidalgo County, its employees and prisoners. There was no evidence that he *granted* any contact visits. The testimony was that on one or two occasions the Sheriff instructed Salinas to supervise a contact visit when he could not be present.

The hierarchy of the Sheriff's Department showed the Sheriff as the head, with Deputy Bob Davis immediately below the Sheriff. Reporting to Bob Davis and the Sheriff, the next level was the "Chief Deputies". Below the Chief Deputies were Captains and Lieutenants, and so forth.

The testimony showed that the persons entitled to grant contact visits were the Sheriff, Bob Davis, the chiefs, the captains and in some instances the lieutenants. Contact visits are visits where the prisoner actually has physical contact with the visitor.

Defendant Salinas was indicted for allegedly participating in this bribe scheme in return for contact visits for the prisoner Homero Beltran. The original indictment

included allegations of bribery involving another prisoner, but those charges were dismissed by the Government upon resting its case.

SUMMARY OF THE ARGUMENT

The Government attempted to literally make a federal case out of a state case. The mechanisms it has used for this purpose are the RICO statute and 18 USC §666, the Federal Bribery statute. For ease of reference throughout this brief 18 USC §1961 et seq. will be referred to as "RICO".

As to 18 USC §666 the Government has not met its burden to show that this is the kind of case contemplated by the Federal Bribery Statute. No funds, Federal or state or county, were disbursed, adversely affected, or unduly influenced by the alleged bribery. In order to make this action by a deputy sheriff in the State of Texas a Federal violation the statute has numerous jurisdictional elements and requirements, some of which have not been met in this case. For example, before a state entity can be held to fall within the purview of the statute, it must receive Federal funds as part of a Federal program. No Federal funds were impinged upon.

As to RICO, Salinas was found not guilty in Count One the substantive RICO count. The Court improperly charged the conspiracy RICO Count Two by failing to require that the jury find that Salinas personally committed or agreed to commit two RICO predicate acts. There was no evidence that he *granted* any contact visits. The testimony was that on one or two occasions the Sheriff

instructed Salinas to supervise a contact visit when he could not be present.

The state law violation the Government has chosen in order to create a Federal RICO case is the Texas Bribery Statute. For a number of reasons, Defendant Salinas feels that the Government has not proven its RICO case and that this was not a RICO case in the first place. For example, RICO requires that the state law be a felony violation. The evidence in this case shows that it was a misdemeanor violation. This and other requirements have not been met and Salinas should have been acquitted on all RICO counts.

Because of the facts of this case, or lack thereof, this case should not have been brought against Salinas.

ARGUMENT AND AUTHORITIES

I. The Fifth Circuit's Opinion Directly Conflicts With The Second Circuit Decision In *Foley* And The Third Circuit Decision In *Cicco* Which Indicate That The Type Of Actions Prosecuted In Salinas Do Not Fall Under The Federal Bribery Statute.

IMPROPER PROSECUTION FOR FAILURE TO UNDULY INFLUENCE FEDERAL PROGRAM FUNDS. It is clear from the legislative history and case law that this case is not within the proscription of 18 USC §666. The Government complains of the alleged contact visits given, supposedly in return for consideration received by the defendants. The statute makes it an offense for someone to corruptly solicit or demand, or accept, or agree to accept, anything of value from any person with intent to

be influenced or rewarded in connection with any "business, transaction, or series of transactions . . . involving value of $5,000.00 or more." 18 USC §666 (a) (1) (B).

However, this case does not involve any granting of contracts in return for kickbacks, accepting of bids, embezzling of government money, theft of government property, granting of leases in return for payoffs, or anything of that nature. Therefore, there is no "business, transaction, or series of transactions . . . involving value of $5,000.00 or more". The statute simply does not apply. No federal funds were disbursed or impinged upon as is required by the law.

In the case of *United States v. Cicco*, 938 F.2d 441 (3rd Cir. 1991), the defendants were charged under §666 for alleged corrupt solicitation of political services and loyalty in exchange for municipal jobs.

> The government argues that it has proven each element of a §666 violation. Under the government's theory, the defendants corruptly solicited political services and loyalty from municipal employees and did so intending to be influenced in the distribution of municipal jobs. Guttenberg annually receives more than $10,000.00 in federal funds and the jobs were worth more than $5,000.00 per-year.

Id. at 444. The court reviewed in depth the legislative history of the statute and the case law interpreting it. The court held, "It is thus apparent that the crimes Congress targeted when it created §666 are simply different in kind than those alleged in the case at bar." *Id.* at 445. In *Cicco*, the Court of Appeals and District Court noted, and the Government agreed, that §666 requires the solicitation to

be in connection with a "transaction of a local government or organization. . . . " *Id.* at 444. The court found that the conduct upon which the indictment was based was simply not a "transaction of a local government" and that §666 was ambiguous. *Id.* at 444. The following cases are examples where the *character* of a proscribed §666 transaction was more appropriately illustrated.

In *United States v. Crozier*, 987 F.2d 893 (2nd Cir. 1993) there was a $30,000.00 payment to a county executive instrumental in helping Crozier obtain a contract with the county to provide architectural services. The court also stated, "Section 666 (c) was enacted to punish corrupt payments made to state or private officials who disburse federal funds." *Id.* at 898. (There was no proof that Sheriff Marmolejo or Deputy Salinas were officials who disbursed Federal funds).

In *United States v. Westmoreland*, 841 F.2d 572 (5th Cir. 1988), a county supervisor appealed her conviction for bribery because she took kickbacks in transactions involving the purchase of county materials. "Evidence of the sales transactions associated with the alleged bribes shows that Westmoreland authorized, and the county paid, a total of $14,482.92 for the purchased goods." *Id.* at 575.

In *United States v. Moeller*, 987 F.2d 1134 (5th Cir. 1993), officials for the former Texas Federal Inspection Service were indicted for improperly awarding consulting contracts. Here there was bribery *involving* Federal money as the court indicated was spoken to by the legislative history. *Id.* at 1136.

In the case presently before this court the Government has not alleged and cannot show any transactions of the nature proscribed by the statute.

The congressional intent was to design tthe statute in a manner to protect Federal monies distriibuted. "The Senate Report specifically states that the new statute, §666, was intended to . . . 'protect the integritty of the vast sums of money distributed through federral programs from . . . undue influence by bribery.' . . . The emphasis was on protecting federal funds." *United Sitates v. Wyncoop*, 11 F.3d 119, 122 (9th Cir. 1993). In Salinas no Federal funds were in any manner impinged upon, nor was any proof submitted on this issue. There is no Federal crime here. As stated in *United States v. Foley*, 73 F.3d 484, 493 (2d Cir. 1996), if the act has "affected neither the financial interests of the protected organization nor ffederal funds directly" there is no violation.

> [W]e have held that there was no viollation of that section where the preservation off federal funds was not implicated by defendamt's conduct; and we have expressed doubt as to whether §666 (a) (1) (B) would be applicable where the conduct at issue affects neiither the federal program funds received by a protected organization nor the receiving organiization's financial interests.

United States v. Foley, 73 F.3d 484, 492 (2d Cir. 1996).

Some Courts have confused this impingement issue with a tracing of funds issue. They have held that Federal funds to the entity that receives them do not have to be traced directly for there to be a violation of 18 USC §666. Their rationale is that Federal funds and local funds are

easily commingled and the Federal character is lost. *United States v. Simas*, 937 F.2d 459, 463 (9th Cir. 1991) This analysis is in conflict with the legislative history of the statute.

> As indicated, this part of title IX covers both theft and bribery type offenses. *With respect to theft*, 18 USC 665 makes *theft or embezzlement* by an officer or employee of an agency receiving assistance under the Job Training Partnership Act a Federal offense. However, there is no statute of general applicability *in this area*; and *thefts* from other organizations or governments receiving Federal financial assistance can be prosecuted under the general theft of Federal property statute, 18 USC 641, only if it can be shown that the property stolen is property of the United States. In many cases, such prosecution is impossible because title has passed to the recipient before the property is stolen, *or the funds are so commingled that the Federal character of the funds cannot be shown.*

1984 USCCAN 3510 (emphasis added).

> *With respect to bribery*, 18 USC 201 generally punishes corrupt payments to Federal public officials, but *there is some doubt* as to whether or under what circumstances *persons not employed by the Federal Government* may be considered as a "public official" under the definition in 18 USC 201 (a) as anyone 'acting for or on behalf of the United States, or any department, agency or branch of Government thereof. . . . '

1984 USCCAN 3510 (emphasis added).

Obviously, the Congressional intent concerning the commingling of funds related to the prosecution of theft

or embezzlement, not bribery. The bribery issue Congress addressed through the passage of §666 was *who* could be prosecuted. Consequently, those cases are wrong that state that in the bribery context, the Government need not show a tracing of Federal assistance funds. Salinas was indicted under the bribery portion of the statute, not the theft or embezzlement provisions.

Regardless of the tracing issue, the legislative history enlightens us as to what was the Congressional intent and the purpose of then new §666.

> The Committee intends that the term 'Federal program involving a grant, a contract, a subsidy, a loan, a guarantee, insurance, or another form of Federal assistance' be construed broadly, consistent with the *purpose* of this section *to protect the integrity of the vast sums of money* distributed through Federal programs *from* theft, fraud, and *undue influence by bribery*.

1984 USCCAN 3511. It, therefore, becomes clear that for the statute to apply some Federal monies must have been unduly influenced by the bribery. This is wholly lacking in the Salinas prosecution.

The Salinas case is even further removed from this jurisdictional element. Here, not only were Federal funds not impinged upon, not even local funds were put in jeopardy. This prosecution is an impermissible stretch of Federal jurisdiction.

The decision of the Fifth Circuit below conflicts directly with these principles and with cases in other circuits.

The focus of the statute here is not on the regulation of state affairs, but, rather the protection of federal funds. This much is certain. However, if a fair reading of the statute shows it to be unclear as to whether the purpose is to regulate particular state affairs or officials, then the "clear statement rule" would come into play and, still, prevent the application of the statute to Salinas under the facts of the case.

> We will not read the ADEA to cover state judges unless Congress has made it clear that judges are included.
>
> . . . .
>
> Rather, it must be plain to anyone reading the Act that it covers judges. In the context of a statute that plainly excludes most important state public officials, 'appointee on the policymaking level' is sufficiently broad that we cannot conclude that the statute plainly covers appointed state judges. Therefore, it does not.

Gregory v. Ashcroft, 501 U.S. 452, 467, 111 S.Ct. 2395, 115 L.Ed.2d 410 (1991).

Here there is no clear statement *as is required* from Congress in order to allow the application of a federal criminal statute to state officials. *McNally v. United States*, 483 U.S. 350, 360, 107 S.Ct. 2875, 97 L.Ed.2d 292 (1987) (mail fraud – state officials – intangible rights to honest and impartial government).

> Rather than construe the statute in a manner that leaves its outer boundaries ambiguous and involves the Federal Government in setting standards of disclosure and good government for local and state officials, we read §1341 as

> limited in scope to the protection of property rights. If Congress desires to go further, it must speak more clearly than this.

483 U.S. at 360. Likewise, §666 is directed to a protection of property, specifically government property. To read it broader than that would result in a direct confrontation of the issue of whether the Federal government can preempt State rights to govern the conduct of and punish its own officials. It is undisputed that concerning criminal law *in general* the States have primacy. "We have also spoken of comity and federalism. 'The States possess primary authority for defining and enforcing the criminal law. . . . ' " *Brecht v. Abrahamson*, 507 U.S. 619, 635, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993). "The Justice Department itself recognizes that a broad interpretation of the . . . provisions would violate 'the principle that the primary responsibility for enforcing state laws rests with the state concerned.' " *Sedima, S.P.R.I. v. Imrex Company, Inc.*, 473 U.S. 479, 503, 105 S.Ct. 3292, 87 L.Ed.2d 346 (1985) (Marshall dissent).

> Under the Government's theory of prosecution, §666 would become a federal anti-bribery statute. Every state falls within the $10,000.00 federal funding jurisdiction element, and thus, every state employee would fall within the jurisdiction of the statute. [FN7] There remains, of course, the $5,000.00 transaction requirement, but according to the Government, any such transaction would be covered by §666, even if there were no connection at all to federal funds.
>
> This reading of §666 is certainly not implausible. However, it would drastically change the

> balance of power between federal and state governments by bringing conduct that had previously been entirely in the realm of the states within the federal purview. Yet, 'unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance.' Bass, 404 U.S. at 349, 92 S.Ct. at 523.
>
> . . . .
>
> FN7. At oral argument, the United States agreed that its construction of the statute would enable it to prosecute, for example, 'a secretary for a state parking agency receiv[ing] federal funds.' (Transcript of June 4, 1996 hearing, at 16:9-10).

United States v. Frega, 933 F.Supp. 1536, 1540 (S.D.California 1996).

"The Court has often stated that when there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language." *McNally v. United States*, 483 U.S. 350, 359, 107 S.Ct. 2875, 97 L.Ed.2d 292 (1987). "We begin with the axiom that, under our federal system, the States possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause." *Tafflin v. Levitt*, 493 U.S. 455, 458, 110 S.Ct. 792, 107 L.Ed.2d 887 (1990). It is basic black letter law that "[O]ur Constitution establishes a system of dual sovereignty between the States and the Federal Government." *Gregory v. Ashcroft*, 501 U.S. 452, 457, 111 S.Ct. 2395, 115 L.Ed.2d 410 (1991) (federal statute interfering with qualifications of State judicial officers).

> 'In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.'
>
> . . . .
>
> This plain statement rule is nothing more than an acknowledgment that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere.

Gregory v. Ashcroft, 501 U.S. 452, 461, 111 S.Ct. 2395, 115 L.Ed.2d 410 (1991).

The statute does not appear to be an exercise of Congress' Commerce Clause power, nor does it seek to justify itself as such. *See*, for example, 18 USC §1962 (c) (RICO requires enterprise engage in or affect interstate commerce). It contains no jurisdictional element that would ensure, through case by case inquiry, that the proscribed conduct affects interstate commerce. Its absence is a marker which indicates that it is not defensible as a Congressional exercise under the commerce clause. *United States v. Lopez*, 115 S.Ct. 1624, 1631, 131 L.Ed.2d 626 (1995).

> We pause to consider the implications of the Government's arguments. The Government admits, under its 'costs of crime' reasoning, that Congress could regulate not only all violent crime, but all activities that might lead to violent crime, regardless of how tenuously they relate to interstate commerce. See Tr. Of Oral Arg. 8-9.

> Similarly, under the Government's 'national productivity' reasoning, Congress could regulate any activity that it found was related to the economic productivity of individual citizens: family law (including marriage, divorce, and child custody), for example. Under the theories that the Government presents in support of §922 (q), it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign. Thus, if we were to accept the Government's arguments, we are hard-pressed to posit any activity by an individual that Congress is without power to regulate.

Id. at 1632.

Especially in an area such as the Salinas case, where Federal and State relations are sought to be balanced by the question of the applicability of a Federal criminal statute to state officials, this Court should hold that §666 does not apply unless Federal funds are impinged upon, i.e., unduly influenced.

CONGRESSIONALLY TARGETED FEDERAL FUNDS WERE NOT UNDULY INFLUENCED. Assuming the alleged bribe can be found to somehow unduly influence Federal funds, the legislative history and a plain reading of the statute indicate that not all Federal funds received by a local agency give rise to the statute's jurisdiction. Before an individual can be found liable under §666, the Government is required to prove that the organization the individual worked for received "federal assistance." "The circumstances referred to in subsection (a) of this section is that the organization, government, or agency receives, in any one year period, benefits in excess

of $10,000 under a Federal *program* involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal *assistance*." 18 USC §666 (b) (emphasis added).

This was alleged by the Government in both Counts Three and Four of the indictment. The "federal assistance" was alleged to have been received between June 1, 1991, and June 1, 1992, in Count Three. The "federal assistance" was also alleged to have been received between September 1, 1992, and September 1, 1993.

The Government has sought to base the applicability of §666 on an alleged contract for services between the Hidalgo County Sheriff's Office and the United States Marshall's Service. It relied on a contract between the Sheriff's Office for the housing of Federal Prisoners and the periodic payments made thereunder. *Government's Response to Defendant's Motion to Dismiss 18 USC Section 666 Counts In Indictment*, paragraph II. See also Joint Appendix page 41.

Both factually and legally the Government has failed to meet this burden. No Federal program and no Federal assistance is involved. Consequently, no protected Federal funds could have been unduly influenced.

This contract is made pursuant to 18 USC §4002 entitled "Federal Prisoners in State Institutions; Employment." However, the Supreme Court of the United States has firmly established the nature of the relationship created by such contracts. *Logue v. United States*, 412 U.S. 521 (1973).

> Though petitioners do not always distinguish between their two theories, they appear to contend alternatively that the Nueces County jail is a "Federal agency" by reason of its contract for the care of federal prisoners, or that the employees of the jail are "acting on behalf of" the Bureau of Prisons or the Government in performing services for federal prisoners. The Court of Appeals rejected these contentions, and we believe that it was right in doing so.

Id. at 526. The role of the Sheriff's Office in this case was defined as that of an independent contractor.

> Thus, Congress not only authorized the Government to make contracts such as the one here in question, but rather clearly contemplated that the day-to-day operations of the contractor's facilities were to be in the hands of the contractor, with the Government's role limited to the payment of sufficiently high rates to induce the contractor to do a good job.

Id. at 529. As stated in the case, "We agree with its relevant holding that the Sheriff's employees were employees of a 'contractor. . . . ' " *Id.* at 530.

Interest is due on late payments under the contract, a further indication of the commercial nature of the contract.

> The Prompt Payment Act, Public Law 97-177 (96 Stat. 85, 31 USC 1801) is applicable to payments under this agreement and requires the payment to the County of interest on overdue payments. Determinations of interest due will be made in accordance with provisions of the Prompt Payment Act and the Office of Management and budget Circular A-25.

Joint Appendix page 50. The Prompt Payment Act §1801 has now been recodified in 31 USC §§3902 and 3903. "[T]he head of an agency acquiring property or service from a business concern, who does not pay the concern for each complete delivered item of property or service by the required date, shall pay an interest penalty to the concern on the amount of the payment due." 31 USC §3902 (a). The Government's attempt to characterize a *1984 partial payment* under a prior contract for *construction* of the jail as meeting the §666 jurisdictional requisite is a recognition that 1991, 1992, and 1993 payments under the Intergovernmental Service Agreement do not qualify as Federal assistance payments under §666. It is simply the Government stretching jurisdiction beyond the limits of the statute.

Obviously, there is no federal assistance here. Rather, the money it pays under the contract to house prisoners in the Hidalgo County Jail are merely funds received in return for services rendered. This issue has also been foreclosed against the Government by the legislative history of §666.

> The term "federal program" means that there must exist a specific statutory scheme authorizing the federal assistance in order to promote or achieve certain policy objectives. Thus, not every federal contract or disbursement of funds would be covered. For example, if a government agency lawfully purchases more than $10,000.00 in equipment from a supplier, it is not the intent of this section to make a theft of $5,000.00 or more from the supplier a federal crime.

1984 USCCAN page 3511. Likewise, in a detailed discussion of this very issue, Courts have already determined the parameters of §666.

> The Court notes that the statute was amended and the amendment became effective in 1986. Subsection (c) of the statute was changed to read as follows:
>
> > (c) This section does not apply to bona fide salary, wages, fees, or other compensation paid, or expenses reimbursed, in the usual course of business.
>
> The amendment reinforces the interpretation that the section was not meant to apply to commercial transactions.

United States v. Stewart, 727 F.Supp. 1068, 1072 (N.D. Tex. 1989). The Government has exceeded the limits of the statute. *Id.* at 1072.

This interpretation is also supported by Federal statutes. The statute dealing with the General Assistance Administration defines the parameters of federal "assistance." 31 USC §6101 (3) (B) indicates that assistance "does not include . . . procurement of property or services for the direct benefit or use of the Government." See also, 18 USC §666 (c) which makes §666 inapplicable to fees, compensation paid, or expenses paid or reimbursed, in the usual course of business.

At trial, the Government's witness on these matters was Phyllis Diane Motes, the administrative officer for the U.S. Marshall's Office responsible for insuring the payment of various local jails for housing the Federal prisoners. Transcript Volume IV, page 1135. She testified

unequivocally that the payments made were contract payments for services rendered and that they were not grant money, Federal assistance or anything of that nature.

BY MR. ENRIQUEZ:

Q. Ms. Motes, would you agree that these payments that you've testified about are contract payments for services rendered?

A. Yes, sir.

Q. They're not grant money or federal assistance or anything of that nature?

A. No, sir.

Transcript Volume IV, pages 1138 and 1139. The Government has, therefore, failed to meet this necessary element.

In summary, the contract funds the Government rely on do not give rise to a Federal Crime under §666. No Federal program funds were unduly influenced as is required.

CONGRESSIONALLY TARGETED FEDERAL FUNDS WERE NOT RECEIVED. In order for Federal program funds to have been unduly influenced, it would logically seem that the local agency must have first received such funds. *See, United States v. Frega*, 933 F.Supp. 1536, 1542 (S.D.California 1996). Indeed, the statute so requires.

> The circumstance referred to in subsection (a) of this section is that the organization, government, or agency receives, in any one year period, benefits in excess of $10,000.00 under a Federal program involving a grant, contract,

> subsidy, loan, guarantee, insurance, or other form of Federal assistance.

18 USC §666 (b). "Taking the words of the statute at face value it is apparent that for purposes of the conduct proscribed by section 666 (a) (1) the defendant *must* be an agent of the agency receiving federal benefits in excess of $10,000." *United States v. Moeller*, 987 F.2d 1134, 1137 (5th Cir. 1993) (emphasis added). The indictment, in fact, stated, "At all times material to this indictment the Hidalgo County Sheriff's Office . . . received federal assistance. . . . " Joint Appendix pages 96 and 97.

In this regard, the applicable portion of §666 targets state employees who are agents of a local government. 18 USC §666 (a) (1). The term "local" is defined in the statute to mean of or pertaining to a political subdivision. Likewise government agency is defined in terms of a political subdivision. 18 USC §666 (d). This was alleged in the indictment and is a jurisdictional prerequisite to prosecution under §666.

The elected office of sheriff is unique in Texas and does not meet the jurisdictional requirements of §666. Sheriffs have no one above them except the voters, and the deputies serve at the sheriff's discretion. *Irby v. Sullivan*, 737 F.2d 1418 (5th Cir. 1984). Deputies such as Salinas are not even considered the type of public officials who have any protected proprietary right in their employment. *Id.* Deputies serve at the pleasure of the sheriff. Texas Local Government Code §85.003. The Sheriff's Office, a constitutionally created elected office, is not an agency created by the state or county. *Tex. Const. Art. V, sec. 23.* Nor are deputies subject to county authorities,

such as the Commissioners Court. Actions by the County attempting to exercise such authority are subject to being enjoined. *Commissioners Court of Shelby County v. Ross*, 809 S.W.2d 754, 757 (Tex. App. – Tyler 1991, no writ). The case of *City of El Paso v. El Paso Community College*, 729 S.W.2d 296, 299 (Tex. 1986) establishes the criteria for a political subdivision. Since the Office of the Sheriff of Hidalgo County, at a minimum, does not have the power to assess and collect taxes it does not meet that criteria. *Id. at 299.* See also *State v. Garcia*, 800 S.W.2d 872, 879 (Tex. App. – San Antonio 1990, petition for discretionary review refused) (sheriff's department is not a political subdivision). In any event, the Government did not present any proof of these issues.

From this discussion, two things become obvious. First, the Office of the Sheriff of Hidalgo County, Texas is not a political subdivision and does not, therefore, meet the requirements of §666. Second, the contract the government relies on is with the County of Hidalgo and not with the Office of the Sheriff of Hidalgo County. Consequently, the jurisdictional prerequisite that an employee of the organization that receives the money be one who committed the crime, is lacking.

> The purpose of this Intergovernmental Service Agreement (IGA) is to establish a formal binding relationship between the U.S. Marshals Service and other federal user agencies (the government) and Hidalgo County, Texas (*The County*) for the detention of persons charged with or convicted of violations of federal law or

> held as material witnesses (federal prisoners) at the Hidalgo County Jail (the facility).

Joint Appendix pages 45 and 46 (emphasis added).

"Our statutory analysis begins with the principle that because §666 is punitive, it must be strictly construed. . . . Therefore, the language and legislative history of §666 must be scrutinized to determine if . . . conduct comes within the statute's prohibitions." *United States v. Barquin*, 799 F.2d 619, 621 (9th Cir. 1986) (defining "political subdivision"). In this case that jurisdictional requisite to state employee criminal responsibility is not met. No federal funds were impinged upon.

666 CONCLUSION

No Federal funds were disbursed or impinged upon as a result of the alleged bribery. As such, Federal funds were not "unduly influenced." Indeed no funds of any governmental agency, Federal, State or local, were influenced at all.

Even if this Court were to find that Federal funds were somehow impinged upon, it is not all Federal funds that are protected by the scope of §666. Only Federal Assistance funds from a Federal program are congressionally targeted under the statute. Here the Government can only rely on a contract for services received. No Federal assistance funds were unduly influenced.

Finally, no Federal funds were impinged upon, since the Office of the Sheriff of Hidalgo County, Texas is not a political subdivision as is required by the statute. The

Federal funds received are not for the Office of the Sheriff, but are for the County, a separate entity.

To prosecute Salinas in the Federal judicial system violates the plain meaning of the statute and legislative history. Under the facts of this case Salinas is not within the scope of §666.

If this Court determines that it is not clear whether Salinas is within the scope of the statute, the clear statement rule would advise that as a matter of federalism he be found not to be included within its scope.

Because of the numerous issues raised by the Government's attempt to make a state case into a federal case and because of the numerous hurdles built into this statute before it can be properly framed as a federal case, the rule of lenity would apply and require a dismissal. *United States v. Hartec Enterprises, Inc.*, 967 F.2d 130, 133 (5th Cir. 1992). Where there is doubt as to whether a conviction is predicated on an impermissible ground the conviction should be vacated. See *Stromberg v. Caiifornia*, 283 U.S. 359, 51 S.Ct. 532, 75 L.Ed. 1117 (1931).

II. The Fifth Circuit's Opinion On The Issue Of RICO Conspiracy Elements Is Directly In Conflict With The First Circuit Decision In *Carrozza*, The Second Circuit Decision In *Ruggiero* and The Tenth Circuit Decision In *Sanders*.

Salinas objected to the Court's instructions to the jury on the RICO conspiracy issue in Count Two of the verdict. The jury found him not guilty of Count One which

was the RICO substantive count. Joint Appendix page 143. The jury found no pattern of racketeering activity as to Salinas.

Yet, the Court's instructions to the jury allowed a finding of guilt to conspiracy without the necessity of the jury finding that this defendant either actually committed two or more of the alleged racketeering acts or that he agreed personally to perform two or more of the specific acts. "A valid RICO conspiracy conviction requires proof that the defendants conspired to engage in a pattern of racketeering activity. Proof of a pattern of racketeering activity requires proof of at least two predicate acts, each of which must be a criminal offense." *United States v. Marcello*, 876 F.2d 1147, 1152 and 1153 (5th Cir. 1989). The defendant, to be found guilty of RICO conspiracy, must have committed or have agreed to commit at least two separate crimes in furtherance of the conspiracy. *United States v. Phillips*, 664 F.2d 971, 1039 (5th Cir. 1981), *cert. denied*, 457 U.S. 1136, 102 S.Ct. 2965 (1982).

> In summary, unless there occurred two separate acts which Echezarreta agreed to do in furtherance of the conspiracy to import marijuana, there was no pattern of racketeering necessary for conviction for participation in a RICO conspiracy. There were no two separate acts.

Id. "The gravamen of the conspiracy charge . . . is that each agreed to participate, directly and indirectly, in the affairs of the enterprise by committing two or more predicate crimes." *United States v. Elliot*, 571 F.2d 880, 902 (5th Cir. 1978).

In one of the earliest RICO cases decided by the Supreme Court the issue of what proof was required in

order to establish a pattern of racketeering was addressed. The case involved a defendant who was convicted under the RICO conspiracy provision. The Court stated that a pattern of racketeering activity is a series of criminal acts and that it "is proved by evidence of the requisite number of acts of racketeering committed *by the participants in the enterprise.*" *United States v. Turkette*, 452 U.S. 576, 583, 101 S.Ct. 2524, 69 L.Ed.2d 246 (1981). (issue: whether both legitimate and illegitimate enterprises are encompassed in RICO) (emphasis added). That is, the participants, to be held liable under RICO are required to do the predicate acts.

As noted in the case of *Sedima, S.P.R.I. v. Imrex Company, Inc.*, 473 U.S. 479, 105 S.Ct. 3275, 87 L.Ed.2d 346 (1985) a racketeering activity must be an act in itself subject to criminal sanction. 473 U.S. at 488. The case involved the application of civil RICO to non-organized crime defendants. There were two substantive RICO counts and one conspiracy RICO count. 473 U.S. at 484.

In *Reves v. Ernst & Young*, 507 U.S. 170, 113 S.Ct. 1163, 122 L.Ed.2d 525 (1993) the Court established the operation or management test for liability under RICO. 507 U.S. at 179. In other words for someone to be subject to RICO's severe civil and criminal penalties he must participate in some directional activities. This requirement permeates the entire statute, not just the substantive provisions. It permeates the Organized Crime Control Act of 1970 of which RICO is a part.

> 'The danger that commission of such offenses by other individuals would subject them to proceedings under title IX [RICO] is even smaller than any such danger under title III of the 1968 [Safe Streets] [A]ct, since commission of a crime listed under title IX provides only one element of title IX's prohibitions. Unless an individual *not only commits such a crime* but engages in a pattern of such violations, and uses that pattern to obtain or operate an interest in an interstate business, *he is not made subject to proceedings under title IX.*' 116 Cong.Rec., at 18940.

507 U.S. at 183.

In construing RICO concepts including conspiracy concepts the Court has stated,

> [W]e may take guidance from a provision elsewhere in the Organized Crime Control Act of 1970 (OCCA), Pub.L. 91-452, 84 Stat. 922, of which RICO formed Title IX. OCCA included as Title X the Dangerous Special Offender Sentencing Act, 18 USC Section 3575 et seq. (now partially repealed). Title X provided for enhanced sentences where, among other things, the defendant had committed a prior felony as part of a pattern of criminal conduct *or in furtherance of a conspiracy to engage in a pattern of criminal conduct.*

H.J. Inc. v. Northwestern Bell Telephone Company, 492 U.S. 229, 240, 109 S.Ct. 2893, 106 L.Ed.2d 195 (1989) (emphasis added). See also, *Sedima, S.P.R.I. v. Imrex Company, Inc.*, 473 U.S. 479, 105 S.Ct. 3275, 87 L.Ed.2d 346 (1985) (useful in interpreting other sections of RICO). As applied to conspiracy as it relates to the pattern requirement, a person is a special offender if he has committed a felony and

> . . . such felony was, or the defendant committed such felony in furtherance of, a conspiracy with

> three or more other persons to engage in a pattern of conduct criminal under applicable laws of any jurisdiction, and the *defendant did, or agreed that he would*, initiate, organize, plan, finance, direct, manage, or supervise all or part of such conspiracy or conduct, or give or receive a bribe or use force as all or part of such conduct.

18 USC §3575 (e) (3) (repealed) (emphasis added). The statute requires the conspirator to personally do or agree to do certain specific acts, precisely what numerous courts below have required in a RICO conspiracy context.

Even the Government in the past has agreed that a RICO §1962 (d) conspiracy requires proof that a defendant agreed to personally commit two or more predicate crimes. *United States v. Winter*, 663 F.2d 1120, 1136 (1st Cir. 1981), *cert. denied*, 460 U.S. 1011, 103 S.Ct. 1249, 75 L.Ed.2d 479 (1983).

The conspiracy case against Defendant Salinas was tried under these theories.

The Court: I thought you told me that . . . And I haven't had a chance to look at it. But I thought you told me that it did apply to . . . I thought you told me that even a RICO conspiracy has to be a conspiracy to do certain RICO acts?

Mr. Surovic: Yes, Sir.

Mr. Canales: Yes.

Mr. Surovic: Each conspirator has to agree to perform –

Mr. Canales: Two.

Mr. Surovic: – at least two racketeering acts.

Mr. Canales: And that's his proposed charge.

Transcript Volume V pages 1230 and 1231.

Mr. Surovic: Your honor, my understanding of the racketeering conspiracy caselaw is that cases have been overturned when it was unclear from the record which particular racketeering acts, especially if they were less than . . . you know, less than two racketeering acts, were identified with each individual. Each individual has to be identified with at least two specific racketeering acts.

Transcript Volume V page 1273.

The Court: I thought that you were all telling me that it has to be a conspiracy precisely to do one of those acts?

Mr. Surovic: Well, yes, your honor. The jury has to determine that they were involved in the conspiracy for purposes of each . . . I mean they have to find specific predicates acts that he was conspiring.

Transcript Volume V page 1290. Mr. Surovic, making these representations to the court, was the AUSA who tried the cause on behalf of the Government.

Defendant Salinas was indicted under this theory. "It was further part of the conspiracy that each defendant agreed that two or more of the acts of racketeering activity, as specified in paragraph 7 of Count One, which are realleged and incorporated by reference herein, would be committed in the conduct of the affairs of the enterprise." Indictment page 36, paragraph 5. Joint Appendix page 89.

Despite it having been the law of the Fifth Circuit and despite it being the law of the case, the Court instructed the jury that Defendant Salinas could be found guilty of RICO conspiracy even if he was not involved in any predicate acts.

> What you are being asked to decide in Count Two is . . . If Salinas was only involved in one or two or even none, did he, nevertheless, know about this pattern. Did he know that this whole pattern of activity was going on and did he then knowingly and willfully join in and participate and contribute in some fashion.

Transcript Volume VI page 1769. Joint Appendix page 139. This was error.

Apparently it was the intent of the trial court to either test the Fifth Circuit's prior rulings on this matter or to bring about a change in the law to conform to what it believed to be the law of some other circuits.

> The Court: And there's this problem that there's some old Fifth Circuit cases that arguably mean something else.
>
> Now, the Eleventh Circuit, supposedly has now said that the fifth circuit probably never meant that and wouldn't mean it today. That case you all gave me a month ago says, 'well, we don't need to reach that', but I'm just saying that even if I get reversed on it, at least we'll get the law cleared up.

Transcript Volume VI page 1590. Joint Appendix page 113.

Certainly, other circuits' opinions in instances do not require the two predicate acts for the RICO conspiracy. But those cases do not elucidate a clear standard and it is very likely that even under their standard the Salinas conspiracy count would still have been instructed in the manner suggested by Salinas. For example, the Eleventh Circuit case which discusses this issue in depth and with extended analysis is *United States v. Carter*, 721 F.2d 1514 (11th Cir. 1984). Yet, the holding in that case mandates the submission requested by Salinas.

> In summary, we hold that where the government's evidence establishes that a defendant agreed to participate in a conspiracy with a single objective, the requisite pattern of racketeering necessary to the objective of a RICO conspiracy is lacking. Only by demonstrating that the defendant agreed to personally commit two or more predicate acts is this lack cured. In a case of this type, the trial court must instruct the jury that an essential element of a RICO conspiracy charge is an agreement to participate in the enterprises's affairs by personally committing, or agreeing to personally commit, two or more predicate acts.

Id. at 1531. Eventually, the Salinas case was submitted on one prisoner, involving one bribe scheme – that is, a single objective. The trial court recognized this when it stated, "I mean, granted, it's one arrangement. . . . " Transcript Volume V page 1243. In actually instructing the jury, he further stated, "[I]f, in fact, they happened, then, as you know . . . I mean, the allegation is that they were all coming from the same source, they were all for the same purpose, they were all fairly related in time. . . . " Transcript Volume VI pages 1759 and 1760. Even the prisoner and his brother-in-law Guardado considered it to be one arrangement, although the prisoner was in the Hidalgo County Jail at two different time periods.

Q. Did you have a discussion with Mr. Marmolejo?

A. Yes, we had a conversation.

Q. What did you talk about?

A. Well, about Homero's coming back to Edinburg and if the same deal could continue like before and he said, yes, and we went ahead and continued with it.

Q. Did you discuss the details of the deal before?

A. They were the same. We did not have to discuss it. We already knew about it.

Transcript Volume II page 520. See also Transcript Volume I pages 218, 234 and 243. There is really no question that the facts in Salinas give rise to a single objective case. In *H.J. Inc. v. Northwestern Bell Telephone Company*, 492 U.S. 229, 109 S.Ct. 2893, 106 L.Ed.2d 195 (1989) there were multiple bribes over a six year period of time with the

objective of influencing utility rates. It was analyzed by the Supreme Court under the theory that such conduct involved a single objective with multiple predicate acts. 492 U.S. at 237.

Since Salinas is a single objective case, even under an Eleventh Circuit analysis the RICO conspiracy count should have been submitted in a manner which required the jury to find that Salinas had performed or agreed to personally perform two or more predicate acts.

The trial court's Memorandum And Order filed August 8, 1995 in addressing this issue and in defending its jury submission on RICO conspiracy relies on the case of *United States v. Coia*, 719 F.2d 1120 (11th Cir. 1983). Joint Appendix page 145. This reliance is misplaced. In that case the court discussed overt acts, not predicate acts. *Id.* at 1124. Also, in reaching its decision it erroneously relied on Second Circuit caselaw. *Id.* at 1124. It is well known that the Second Circuit requires the type of submission requested by Salinas. "All that must be shown is: (1) that defendant agreed to commit the substantive racketeering offense through agreeing to participate in two racketeering acts. . . . " *United States v. Delano*, 825 F.Supp. 534, 542 (W.D.N.Y. 1993).

There is serious doubt whether a single objective scheme even with multiple predicate acts comes within the proscription of RICO. *H.J. Inc. v. Northwestern Bell Telephone Company*, 492 U.S. 229, 242, 109 S.Ct. 2893, 106 L.Ed.2d 195 (1989). Salinas was indicted on three predicate acts only two of which went to the jury. He was found to have committed only one. Two predicate acts without more do not constitute a pattern. *H.J. Inc. v.*

Northwestern Bell Telephone Company, 492 U.S. 229, 242, 109 S.Ct. 2893, 106 L.Ed.2d 195 (1989); *Sedima, S.P.R.I. v. Imrex Company, Inc.*, 473 U.S. 479, 497 n.14, 105 S.Ct. 3275, 87 L.Ed.2d 346 (1985).

The intent of Congress both from a plain reading of the statute and its legislative history is that for someone to come under the proscription of RICO conspiracy he must have committed a predicate act or at the very least agreed to personally commit a predicate act. For example, 18 USC §1962 (d) states, "It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section." The substantive provision which the Salinas conspiracy count refers to states,

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, *to conduct or participate*, directly or indirectly, in the conduct of such enterprises affairs *through a pattern of racketeering activity* or collection of unlawful debt.

18 USC §1962 (c) (emphasis added). As noted above, in *Reves v. Ernst & Young*, 507 U.S. 170, 113 S.Ct. 1163, 122 L.Ed.2d 525 (1993) the Court, in interpreting the "to conduct or participate" requirement, established the operation or management test for liability under RICO. 507 U.S. at 179. In other words for someone to be liable for RICO's severe civil and criminal penalties he must participate in some directional or managerial activities. The RICO conspiracy provision in essence requires that Salinas must have conspired "to conduct or participate . . . through a pattern of racketeering activity. . . . "

As defined in the statute " 'pattern of racketeering activity' requires at least two acts of racketeering activity. . . . " 18 USC §1961 (5). A plain reading dictates the instruction requested by Salinas.

It is disingenuous for the Government to now argue to the contrary when the case was tried under this theory, where proposed Government Instructions were submitted under this theory and where Salinas was indicted under this concept.

> . . . Brigidio Marmolejo, Jr., Mario Salinas, Eloy Zavala, and Edelmiro Flores . . . did combine, conspire, confederate, and agree with each other . . . to violate Title 18, United States Code, Section 1962 (c), *that is, to conduct and participate*, directly and indirectly, in the conduct of the affairs of the enterprise *through a pattern of racketeering activity*.

Joint Appendix page 89 (emphasis added).

Additionally, Salinas was a deputy sheriff deputized by the Sheriff of Hidalgo County, Texas. When the focus of a Federal statute is not on the regulation of state affairs, then there is no clear statement *as is required* from Congress in order to allow the application of a federal criminal statute to state officials. *McNally v. United States*, 483 U.S. 350, 360, 107 S.Ct. 2875, 97 L.Ed.2d 292 (1987) (mail fraud – state officials – intangible rights to honest and impartial government).

> Rather than construe the statute in a manner that leaves its outer boundaries ambiguous and involves the Federal Government in setting standards of disclosure and good government for local and state officials, we read §1341 as

> limited in scope to the protection of property rights. If Congress desires to go further, it must speak more clearly than this.

483 U.S. at 360.

Under both the majority and the dissent, the focus of the statute was an important consideration. With that kind of analysis, it is clear from the history of RICO that its focus is organized crime and not state officials. Consequently, Salinas' prosecution under this statute is arguably not authorized. "The Court has often stated that when there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language." *McNally v. United States*, 483 U.S. 350, 359 107 S.Ct. 2875, 97 L.Ed.2d 292 (1987). "We begin with the axiom that, under our federal system, the States possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause." *Tafflin v. Levitt*, 493 U.S. 455, 458, 110 S.Ct. 792, 107 L.Ed.2d 887 (1990) (it is proper for federal court to abstain on a civil RICO claim pending in state court). *See also, Gregory v. Ashcroft*, 501 U.S. 452, 457, 111 S.Ct. 2395, 115 L.Ed.2d 410 (1991) (federal statute interfering with qualifications of State judicial officers).

Although purporting to use State statutes as predicate acts for RICO, in fact the lower Federal Courts have created their own interpretations of state law and have instead in essence established a federal standard of conduct for state officials, a clear violation of the principles of federalism.

For example, the allegations and facts adduced at trial, if taken as true, at most constitute a Class A Misdemeanor under State Law and therefore cannot be predicate acts under RICO. 18 USC §1961 (1) (A). Only a felony under Texas Law can constitute a predicate act for RICO purposes. *Id*. Texas Penal Code §36.08 (b), a misdemeanor statute, applies to the allegations against this defendant, if taken as true. The pertinent provisions are as follows:

> (b) A public servant in an agency having custody of prisoners commits an offense if he solicits, accepts, or agrees to accept any benefit from a person the public servant knows to be in his custody or the custody of his agency.
>
> . . . .
>
> (g) An offense under this section is a Class A misdemeanor.

Texas Penal Code §36.08 (b) and (g).

This is noted in the practice commentary to the statute. "Like bribery, the offense punishes the public servant who solicits a gift as well as the one who accepts or agrees to accept one. It is narrower than bribery, however, in that it applies only to public servants with specified governmental functions." Practice Commentary following §36.08 of the Texas Penal Code.

The Government contention is that the defendant's actions come within the prohibition of the general bribery statute, Texas Penal Code §36.02, a felony statute. However, since another more specific statute applies (the misdemeanor statute) this brings into play the concept that it is only the specific statute which will be applied. *Tawfik v. State*, 643 S.W.2d 127 (Tex. Ct. Crim. App. 1982) (En banc);

Ex parte Holbrook, 606 S.W.2d 925 (Tex. Ct. Crim. App. 1980) (En banc); *Ex parte Harrell*, 542 S.W.2d 169 (Tex. Ct. Crim. App. 1976).

Punishment under State Law for a Class A Misdemeanor includes a possibility of confinement for a term not to exceed one year. Texas Penal Code §12.21. However, the applicable RICO provisions only prohibit racketeering activities (predicate acts) which are punishable by imprisonment for more than one year. 18 USC §1961 (1) (A).

Therefore, the racketeering acts alleged by the Government cannot constitute predicate acts for the RICO Conspiracy Count Two. That is state law. Yet, the Courts below have chosen to not follow established principles of state law. Rather, the Fifth Circuit relied on Federal Law to interpret this area. "The appropriate inquiry is which statute criminalizes the defendant's conduct here. *See Tunnell*, 667 F.2d at 1185 (concluding that defendants were properly charged under the statute which criminalized their exact behavior)." *United States v. Marmolejo*, 89 F.3d 1185, 1195 (5th Cir. 1996).

As another example, in Count Two of the indictment of which Salinas was convicted, and in all racketeering acts alleged, the Government has claimed that the prisoner in question was "a person then being held in the custody of the Hidalgo County Sheriff's Office by order of the Federal Court. . . . " The actions the Government complains of are alleged to be in violation of Texas Penal Code §36.02 (a). This is one of the Texas Bribery Statutes. Texas Penal Code §36.01 defines "custody" and requires

an order of the Court, hence the Government's allegations in the indictment.

There exists no order of the Court and none was introduced by the Government at trial which orders the prisoner in question to be held in custody in the Hidalgo County Jail. Instead, this Salinas alleges and the Government concedes that the custody in the Hidalgo County Jail is pursuant to agreement between the U. S. Marshall's Service and the County of Hidalgo. Evidence of this was introduced at trial. Joint Appendix page 41.

Therefore, defendant's conduct, again, as alleged does not fall within the prohibition of 36.02 (a) of the Texas Penal Code as claimed by the Government. *Hild v. State*, 94 S.W.2d 733 (Tex. Crim. App. 1936) (Legal Custody must be alleged in the indictment). Yet, the courts below did not follow State law on this issue.

As a further example, and as noted above, Mario Salinas, a deputy sheriff, does not come within the "public servant" provisions of Section 36.02 of the Texas Penal Code, and cannot be found guilty under RICO Conspiracy Count Two. Despite this, the trial court instructed the jury that the office of the Sheriff of Hidalgo County was in essence a political subdivision of the State of Texas.

The Government relied on state law violations for the predicate acts necessary to find guilt under the Federal RICO statute. These so called violations, under these circumstances, cannot be considered predicate acts. The above analysis indicates that if the federal courts below had followed State law construction of the Texas Bribery Statute they would have found no violation of the statute

relied upon by the government. Consequently, Salinas, a deputy in Texas, could not have been prosecuted under RICO, either on the substantive charge or the conspiracy charge. Thus, it is clear that federal courts have established their own federal standard of what actions by the Sheriff's Office violate State law. "[I]t is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state laws." *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 106 (1984) (11th Amendment context).

Also implicated when the Federal government seeks to create and impose a standard of conduct on state officials is a potential Commerce Clause conflict. "As against Congress' powers '[t]o regulate Commerce . . . among the several States.' U.S. Const., Art. I, §8, cl. 3, the authority of the people of the States to determine the qualifications of their government officials may be inviolate." *Gregory v. Ashcroft*, 501 U.S. 452, 464, 111 S.Ct. 2395, 115 L.Ed.2d 410 (1991). "When Congress criminalizes conduct already denounced as criminal by the States, it effects a 'change in the sensitive relation between federal and state criminal jurisdiction.' " *United States v. Lopez*, 115 S.Ct 1624, 1631 n.3, 131 L.Ed.2d 626 (1995). How much more so when courts impose a Federal standard of conduct and seek to punish state officials under that conduct.

RICO CONCLUSION

To require before a RICO conspiracy conviction that a defendant committed or personally agreed to commit two specific acts is consistent with the view in both the majority and minority of circuits that in a single objective RICO conspiracy, the court should instruct the jury in the manner requested by Salinas.

Regardless of whether it is a single object conspiracy or a multiple object conspiracy, a plain reading of the RICO statute, the Organized Crime Control Act of 1970, and the legislative history require the elements suggested by Salinas.

Since State Officials are involved this Court should require, at least in this case, that the Salinas requested instruction should have been given. Such a requirement provides some safeguard that a defendant will not be convicted in a situation where it is questionable that the statute even applies. It also provides some measure of specificity to a situation, such as this, where the Constitutional structure of federalism comes into play.

Because of the numerous issues raised by the Government's attempt to make a state case into a federal case and because of the numerous hurdles built into this statute before it can be properly framed as a federal case, the rule of lenity would apply and require a dismissal. *United States v. Hartec Enterprises, Inc.*, 967 F.2d 130, 133 (5th Cir. 1992). Where there is doubt as to whether a conviction is predicated on an impermissible ground the conviction should be vacated. See *Stromberg v. California*, 283 U.S. 359, 51 S.Ct. 532, 75 L.Ed. 1117 (1931).

CONCLUSION

For the reasons set forth above, defendant Mario Salinas' convictions of Counts Two, Three and Four should be reversed, and judgment of acquittal entered. Further in the alternative Salinas' conviction should be reversed and this matter remanded for a new trial. Salinas further prays for general relief.

Respectfully submitted,

FRANCISCO J. ENRIQUEZ*
ROLANDO CANTU
ENRIQUEZ & CANTU, L.L.P.
4200-B N. Bicentennial
McAllen, Texas 78504
(210) 686-5291

Attorney for Petitioner
**Counsel of Record*